IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 385 OF 1997
IN
WRIT PETITION NO. 3547 OF 1987

1a. Mrs. Mona wife of Pamo Lala]
1b. Mr. Ranjit s/o Pamo Lala,]
both residing at 1/19, Chetan Co-]
-Op. Housing Society Limited,]
Near Vakola Bridge, Santacruz (E),]
Bombay - 400 055.] .. Appellants

Versus

1. The Maharashtra Housing & Area]
Development Authority, Griha Nirman]
Bhavan, 4th floor, Bandra (East),]
Bombay - 400 051.]

2. The Administrator (Competent]
(Authority) and Appellate Authority,]
Maharashtra Housing & Area]
Development Authority, Griha Nirman]
Bhavan, 4th floor, Bandra (East),]
Bombay - 400 051.]

3. State of Maharashtra.]

4. The President, Maharashtra Housing]
& Area Development Authority,]
having his office at Griha Nirman]
Bhavan, 4th floor, Bandra (East),]
Bombay - 400 051.]

5. The Vice President & Chief Executive]
Officer, Maharashtra Housing & Area]
Development Authority, having his]
office at Griha Nirman Bhavan,]
4th floor, Bandra (East),]
Bombay - 400 051.] .. Respondents

Mr. G.K. Masand with Mrs. Sawant for the appellants.

Mr. S.M. Dixit, AGP, for the respondents.

CORAM: R.M. LODHA &
ANOOP V. MOHTA, JJ.

DATED: 14TH FEBRUARY, 2006

ORAL JUDGMENT: [Per R.M. Lodha, J.]

. Pamo Thakurdas Lala (since deceased) joined the services of Bombay Housing Board as Rent Collector in class III service on 17th February, 1958. He was promoted as Senior Cashier on 22nd December, 1961. He was further promoted to the post of Assistant Estate Manager on 1st July, 1986. By the order dated 26th June, 1987, he was compulsorily retired. He challenged the order of compulsory retirement by filing a Writ Petition No. 3547 of 1987. The learned Single Judge, by the order dated 31st August, 1996, dismissed the Writ Petition giving rise to the present Appeal.

2. During the pendency of the Appeal, Pamo Thakurdas Lala died and his legal heirs have been brought on record.

3. The learned counsel for the appellant has challenged the judgment of the learned Single Judge on the grounds set out in paragraphs (g), (h), (k), (l),

and (m) of the Memo of Appeal.

4. Most of these grounds are overlapping. The crux of the contentions is that the employee was promoted to class II service from 1st July, 1986 and that would mean that he was quite good upto that date, otherwise, he would not have been promoted to class II service from class III service; the adverse remarks recorded in the Confidential Report of the employee stood washed out on his promotion on 1st July, 1986; the service record of the employee does not show in any manner that he was below average and that the Special Review Committee that considered the case of the employee was not competent to review the case of the employees of class II service.

5. Mr. G.K. Masand, the learned counsel for the legal heirs of the deceased appellant invited our attention to the judgments of the Supreme Court in the case of **Sukhdeo Vs. Commissioner, Amravati Division, Amravati & Anr. 1996 S.C.C. (L&S) 1141,** and **Madan Mohan Choudhary Vs. The State of Bihar & Ors. 1991 (1) Supreme, 448**. He also relied upon a Division Bench judgment of this Court delivered by the Bench presided over by one of us (R.M. Lodha, J.) on 13th June 2005 in **Writ Petition No. 2386 of 1999 Vasant Lalchand Shah Vs.**

National Textile Corporation.

6. The legal position is considered in the case of **Madan Mohan Choudhary** (supra) thus:

> "29. The question relating to uncommunicated adverse entries has been the subject matter of several decisions of this Court. In *Union of India v. M.E. Reddy*, it was laid down that uncommunicated adverse remarks can be relied upon while passing an order of compulsory retirement. But in two subsequent decisions, namely *Brij Mohan Singh Chopra v. State of Punjab* and *Baidyanath Mahapatra v. State of Orissa*, it was laid down that uncommunicated adverse entries could not be legally relied upon while making an order of compulsory retirement. It was also laid down in *Baidyanath's* case (supra) that if a representation was pending against the adverse remarks, the adverse entries against which the representation is made could not be taken into consideration unless the representation itself was considered and disposed of.
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> 30. Both these decisions were considered by a Three-Judge Bench in *Baikuntha Nath Das's* case (supra) and were overruled and the following five principles were laid down:-
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> > (i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.
> >
> > (ii) The order has to be passed by the Government on forming the opinion that it is in the public interest to retire a Government servant compulsorily. The order is passed on the subjective satisfaction of the Government.
> >
> > (iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny

> is excluded altogether. While the High Court or this Court would not examine the matter as an Appellate Court, they may interfere if they are satisfied that the order is passed (a) malafide or (b) that it is based on no evidence or (c) that it is arbitrary - in the sense that no reasonable person would form the requisite opinion on the given material in short, if it is found to be a perverse order.
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> (iv) The Government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter - ofcourse attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/character roles, both favourable and adverse. If a Government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks loose their sting, moreso if the promotion is based upon merit (selection) and not upon seniority.
>
> (v) An order of compulsory retirement is not liable to be quashed by a court merely on the showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance, by itself cannot be a basis for interference.

31. The decision has since been followed in *Posts & Telegraphs Board v. C.S.N. Murthy; Secretary to the Government Harijan & Tribal Welfare Department, Bhubaneswar v. Nityananda Pati* and *Union of India v. V.P. Seth* and considered by this court in *M.S. Bindra v. Union of India & Ors.* and again in *The State of Gujarat & Anr. v. Suryakant Chunilal Shah*.

32. The fifth principle in *Baikunth Nath Das's* case (supra), which has already been

extracted above, itself contemplates that the mere circumstance that uncommunicated adverse remarks were taken into consideration would not constitute a basis for interference with an order of compulsory retirement. In para 32 of the judgment, the learned Judges observed as under:-

> "32. We may not be understood as saying either that adverse remarks need not be communicated or that the representations, if any, submitted by the Government servant (against such remarks) need not be considered or disposed of. The adverse remarks ought to be communicated in the normal course, as required by the rules/orders in that behalf. Any representation made against them would and should also be dealt with in the normal course, with reasonable promptitude. All that we are saying is that the action under F.R. 56(j) (or the rule corresponding to it) need not await the disposal or final disposal of such representation or representations, as the case may be. In some cases, it may happen that some adverse remarks of the recent years are not communicated or if communicated, the representation received in that behalf are pending consideration. On this account alone, the action under F.R. 56(j) need not be held back. There is no reason to presume that the Review Committee or the Government, if it chooses to take into consideration such uncommunicated remarks, would not be conscious or cognizant of the fact that they are not communicated to the Government servant and that he was not given an opportunity to explain or rebut the same. Similarly, if any representation made by the Government servant is there, it shall also be taken into consideration. We may reiterate that not only the Review Committee is generally composed of high and responsible officers, the power is vested in Government alone

> and not in a minor official. It is unlikely that adverse remarks over a number of years remain uncommunicated and yet they are made the primary basis of action. Such an unlikely situation, if indeed present, may be indicative of malice in law. We may mention in this connection that the remedy provided by Article 226 of the Constitution is no less an important safeguard. Even with its well known constraints, the remedy is an effective check against malafide, perverse or arbitrary action."
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> 33. The observations indicate that the adverse remarks if recorded in an employee's character role in the "normal course", ought to be communicated to him and if any representation is made against those remarks, the said representation should be disposed of in the "normal course" but with promptitude. It was further emphasised that the pendency of representation against the adverse remarks or non disposal of that representation would, however, not prevent the action being taken for compulsory retirement of the employee even on the basis of that entry either under F.R. 56(j) or any provision equivalent thereto."

7. In the light of the aforesaid legal position, we perused the original record that was placed before us by the Advocate for the respondents. The deceased employee was communicated adverse remarks for the year 1984-85 on 2nd September, 1985. The said remarks read thus: "An average type of senior cashier. He is quite easy going". His fitness for promotion is recorded in the negative.

8. On 9th May 1986, the deceased employee was communicated the adverse remarks recorded during the period 1st November 1985 to 31st March 1986. The said remarks read thus: "Average type of hand and a slow worker."

. Against the column fitness for promotion, "No" is recorded.

. The Reviewing Officer also recorded that he should take interest in the work and show progress in clearance of long outstanding arrears for which he is responsible.

9. It is true that the petitioner was promoted to the post of Assistant Estate Manager with effect from 1st July, 1986, but it appears that the said promotion was given based on seniority alone. The learned counsel for the appellant could not show us any regulation or rule that the promotion to the post of Assistant Estate Manager given to the employee on 1st July, 1986, was based on merit. Rather the original record that was shown to us by the Secretary of respondent No.1 who is present in court, shows that the employee was promoted solely on the ground of seniority. If that be so, it cannot be said that the adverse remarks completely lost

their significance. In **Madan Mohan Choudhary** (supra), the Supreme Court referred to the principles laid down in **Baikunth Nath Das** wherein it was laid down that the Review Committee shall have to consider the entire record of service before taking a decision in the matter - ofcourse attaching more importance to record of his performance during the later years. The record to be so considered would naturally include the entries in the Confidential Record/character roles, both favourable and adverse. If a Government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks loose their sting, moreso if the promotion is based upon merit (selection) and not upon seniority. As already indicated above, there is nothing to show that the promotion of the employee to the post of Assistant Estate Manager was based on merit (selection). If the promotion was given to the employee based on seniority, it cannot be said that the adverse remarks stand wiped out. However, looking to the entire record of service, it cannot be said that the order of compulsory retirement is based on no evidence or that it was arbitrary. It is not the case of the learned counsel for the appellants that the order of compulsory retirement was passed malafide.

10. Taking overall facts and circumstances of the

case, we find no justification in interfering with the order of the learned Single Judge.

11. As regards the objection raised by the learned counsel for the appellants that the Special Review Committee that considered the case of the deceased employee was not competent to review his case, suffice it to observe that no such case was argued before the learned Single Judge. Nothing has been show to us either.

12. We thus find no merit in the Appeal and it is dismissed with no order as to costs.

Sd/-
[R.M. LODHA, J.]

Sd/-
[ANOOP V. MOHTA, J.]

[srpasha@hc]